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IN THE
SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1948.

No. 169.

**FRANK A. THOMPSON, Trustee for the St. Louis-
San Francisco Railway Company, Debtor,
Petitioner,**

vs.

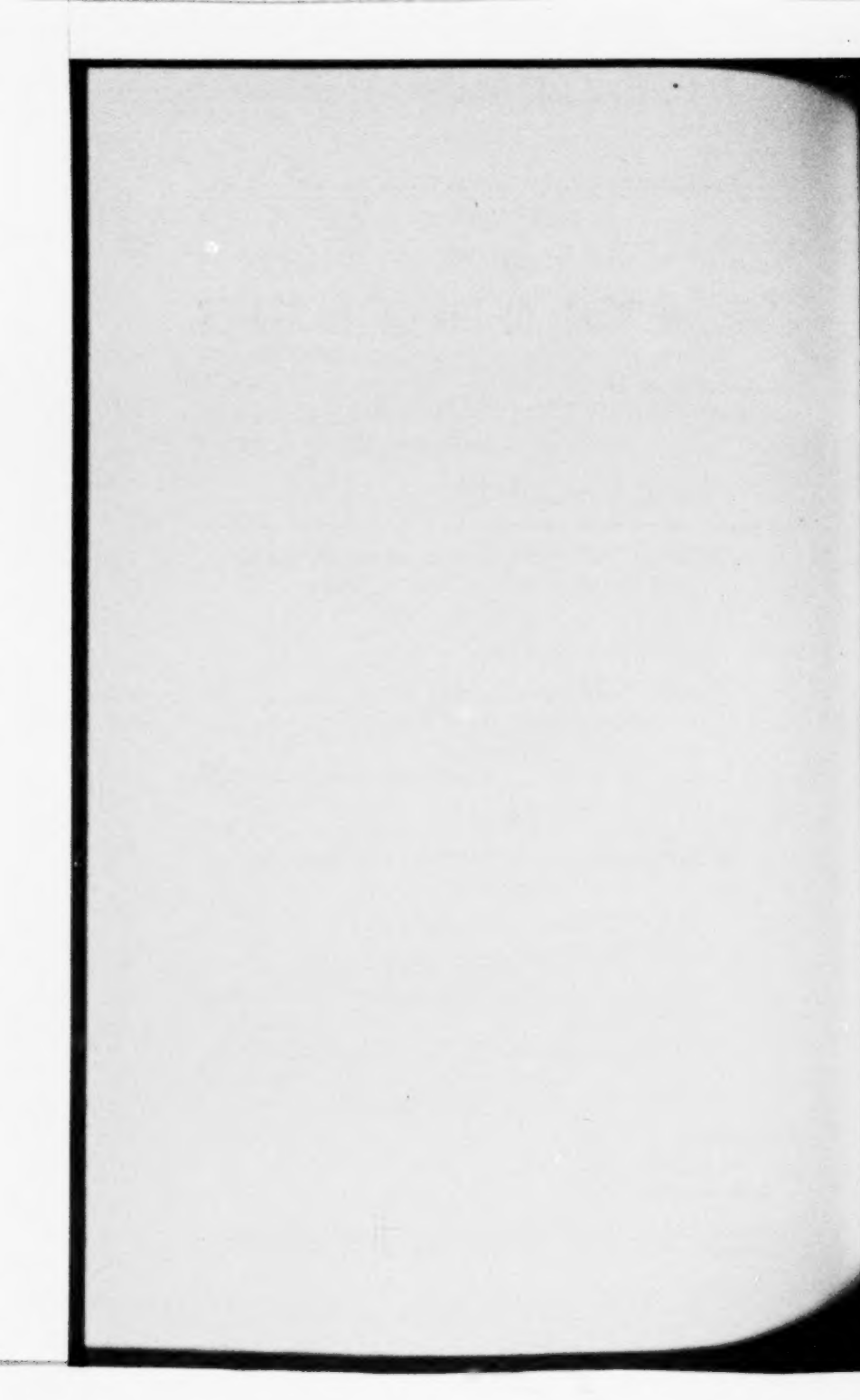
**LOUISE CAMP, Administratrix of the Estate of
Irving (Ervin) Camp, Deceased,
Respondent.**

BRIEF
Of Respondent in Opposition to Petition for
Certiorari.

✓ **WALTER P. ARMSTRONG,**
800 Commerce Title Building,
Memphis 3, Tennessee,
Attorney for Respondent, Louise Camp,
Administratrix of the Estate of
Ervin Camp, Deceased.

Of Counsel:

✓ **W. E. HENDRIX,**
✓ **R. G. DRAPER.**



INDEX.

	Page
Statement	1
Opinions of the lower courts.....	2
Jurisdiction	2
Statement of the case.....	3
Argument	4
The Circuit Court of Appeals properly entertained respondent's motion to limit the issues on re- mand	4
The Circuit Court of Appeals properly limited the issues on remand.....	5
Conclusion	7
Appendix. Stipulation of counsel.....	9

Cases Cited.

Grubb v. Public Utilities Corporation of Ohio, 281 U. S. 470.....	5
Gasoline Products Co., Inc., v. Champlin Refining Co., 283 U. S. 494	5
Thompson v. Camp, 167 Fed. (2) 396 (C. C. A. 6, Aug. 11, 1947); Idem., 167 Fed. (2) 733 (C. C. A. 6, Apr. 23, 1948)	2

Statutes Cited.

Employers' Liability Act (45 U. S. C. A., Secs. 51-60) .	2
Federal Rules of Civil Procedure, Rule 59.....	6
28 U. S. C. A., Sec. 877.....	6

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LOUISE CAMP, Administratrix of the Estate of
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BRIEF
Of Respondent in Opposition to Petition for
Certiorari.

To the Honorable the Chief Justice of the United States
and the Associate Justices of the Supreme Court of
the United States:

The petition for certiorari raises questions which, in
their essence, rest for decision in the discretion of the
Circuit Court of Appeals. Nothing concerning jurisdic-
tion, power of adjudication or constitutional limitations is

involved. Nothing of importance concerning broad questions of procedure under the Employers' Liability Act (45 U. S. C. A., secs. 51-60) or otherwise is involved. The petition seeks to challenge the action of the Circuit Court of Appeals in a suit under the Employers' Liability Act:

(1) In entertaining the motion of respondent to limit the issues on remand for a new trial, made prior to the issuance of mandate and following denials by this Court of cross-petitions for certiorari by petitioner and respondent;

(2) In limiting the issues on remand for a new trial on the sole open issue of damages.

The unsubstantial nature of the questions presented, together with the correct results reached, should, we submit, require denial of the petition for certiorari.

OPINIONS OF THE LOWER COURTS.

Thompson v. Camp, 167 Fed. (2) 396 (C. C. A. 6, Aug. 11, 1947);

Idem, 167 Fed. (2) 733 (C. C. A. 6, Apr. 23, 1948).

The statement of petitioner, headed as above (Petition for certiorari and brief, p. 9) is correct.

JURISDICTION.

The statement of petitioner as to the basis of jurisdiction (Petition for certiorari and brief, p. 5) is not challenged.

STATEMENT OF THE CASE.

Much of petitioner's Statement of the Case (Petition for certiorari and brief, p. 10) is irrelevant to the questions presented by the petition. This is especially true of detailed references to portions of the evidence, not complete, concerning the **merits** of the avoidance of the release procured from respondent's intestate, a settled issue not before the Court. Therefore, we do not supplement nor correct such portions of the Statement.

For accuracy and completeness we add to petitioner's Statement:

While contributory negligence of respondent's intestate was pleaded by petitioner as a defense (R. 10) no evidence of such negligence was submitted at the trial (R. 55-526).

Following denial by the Circuit Court of Appeals (R. 643) of petitions for rehearing filed both by petitioner and respondent, the mandate of that Court was expressly stayed pending application to this Court for writ of certiorari and if such application were timely filed, until final disposition of the case in this Court (Stipulation of counsel, Appendix, this brief, p. 9).

ARGUMENT.

The Circuit Court of Appeals Properly Entertained Respondent's Motion to Limit the Issues on Remand.

Following the reversal of the judgment of the District Court by the Circuit Court of Appeals for its error in refusing a requested instruction as to damages (R. 603, 604, et seq.) both parties filed petitions to rehear (R. 619, 635).

Both petitions for rehearing were overruled (R. 643). Thereupon, the Circuit Court of Appeals entered an order staying its mandate pending the timely filing of a petition for certiorari in this Court, and, if timely filed, until its disposition (Stipulation of counsel, Appendix, this brief, p. 9).

The mandate of the Circuit Court of Appeals having thus been stayed pending outcome of certiorari proceedings, there was no occasion then to apply to the Circuit Court of Appeals to define the scope and content of such mandate. That question arose upon denial by this Court of the petitions for certiorari and it was promptly raised (Supp. R. 1).

The essential nature of the action of the Circuit Court of Appeals was not changed by its granting of respondent's motion to limit the issues on remand. Its original action, prior to certiorari, and stayed by the pursuit of that remedy, was to reverse and remand for a new trial (R. 603). Its final action was likewise to reverse and remand for a new trial, limited to the amount of damages (Supp. R. 12).

The cause was before the Circuit Court of Appeals for disposition when respondent's motion to limit the issues on remand was there made. It was clearly within the competence of that Court to entertain the motion and to shape its unissued mandate accordingly. On the strongest possi-

ble view of petitioner's contention only a question of discretion on the part of the Circuit Court of Appeals is posed, concerning which this Court is not called upon to decide.

No rule of the Circuit Court of Appeals is alleged to have been broken; no authority impeaching its action in entertaining the motion is cited. Cases dealing with res judicata and the effect of a judgment on the merits in one suit as foreclosing the presentation in a different and later suit of new matter which might have been but was not presented in the former suit, are completely irresponsive. Thus, the reliance by petitioner on **Grubb v. Public Utilities Corporation of Ohio**, 281 U. S. 470, is not well founded.

It is submitted that the first question presented by petitioner as a ground of seeking the granting of the writ of certiorari does not warrant action by this Court.

**The Circuit Court of Appeals Properly Limited
the Issues on Remand.**

That the Circuit Court of Appeals had the power to remand this cause for determination of the only open issue—damages—is conceded by petitioner.

**Gasoline Products Co., Inc., v. Champlin Refining
Co. (283 U. S. 494).**

Whether that power was properly exercised on the facts of this case raises no general question of importance which should move this Court to grant certiorari.

Moreover, an examination of the record in this cause discloses a classic case for exercise of the power of limitation of issues in the interest of justice.

The question of the liability of petitioner has been litigated and determined by court and jury. No useful purpose would be served by its relitigation.

The question of the validity of the release procured from respondent's intestate has likewise been fairly litigated and determined adversely to petitioner by court and jury. The ends of justice are best served by writing "finis" to that phase of the case.

These issues are separable from the amount of damages due from petitioner to respondent. The single ground for reversal by the Circuit Court of Appeals of the judgment of the District Court was error in the charge on the issue of damages. That error can be corrected, with fairness to all, and with due conservation of time and expense, by retrying only that phase of the case affected by the error.

Rule 59, Federal Rules of Civil Procedure, provides:

"New Trials:

"(a) Grounds. A new trial may be granted to all or any of the parties and on all **or part** of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . ."

 (Emphasis supplied.)

While the Rules are expressly applicable to action of a trial court, this particular provision is further indicative of a Congressional mandate to appellate courts to act likewise under statutory authority. (See 28 U. S. C. A., sec. 877.)

The Circuit Court of Appeals properly exercised its power to grant a new trial on part of the issues in this case. The severable issue of damages offers the only open matter for redetermination. The Circuit Court of Appeals, in our submission, should have gone further than it did. On petitioner's petition to rehear (Supp., R. 15) that Court elided from its Per Curiam opinion all references to contributory negligence of respondent's intestate (Supp.,

R. 17). Since there was no evidence of such contributory negligence produced at the trial, such action by the Circuit Court of Appeals might have formed the basis of a petition for certiorari filed by this respondent. Although none was filed, it is pointed out that petitioner's criticism of the Court's ultimate action fails to take into account the action of that Court in connection with its petition to rehear.

Substantial justice does not require a rehash and retrial of settled matter, where parties have had their day in court and where, as here, the remaining issue may be separately settled without prejudice to either party.

No ground for certiorari is presented by petitioner's second question.

CONCLUSION.

The Circuit Court of Appeals, on timely motion, remanded this cause for retrial of the only open issue: damages. No substantial question in connection with such action is presented by the petition for certiorari. It is submitted that the petition for certiorari should be denied.

Respectfully submitted,

WALTER P. ARMSTRONG,
800 Commerce Title Building,
Memphis 3, Tennessee,
Attorney for Respondent, Louise Camp,
Administratrix of the Estate of
Ervin Camp, Deceased.

Of Counsel:

W. E. HENDRIX,
R. G. DRAPER.



APPENDIX.

Stipulation of Counsel.

It Is Stipulated by and between counsel representing petitioner and respondent that the following order staying mandate was duly entered on motion of counsel for respondent herein, by the United States Circuit Court of Appeals, Sixth Circuit, October 10, 1947:

“No. 10,362.

In the
United States Circuit Court of Appeals,
Sixth Circuit.

Frank A. Thompson, Trustee for the St. Louis-San
Francisco Railway Company, Debtor,
Defendant-Appellant,

vs.

Louise Camp, Administratrix of the Estate of Irving
(Ervin) Camp, Deceased,
Plaintiff-Appellee.

Order Staying Mandate.

This cause came on to be heard upon the motion of Louise Camp, Administratrix of the Estate of Irving (Ervin) Camp, Deceased, Plaintiff-Appellee, for a stay of mandate, and it appearing to the Court that it is the purpose of said Plaintiff-Appellee to file a petition for certiorari in the Supreme Court of the United States seeking to remove this cause to that Court in

order to have it here determined; and on consideration of said motion it was

Ordered that the same be and it is hereby sustained.

It Is Further Ordered that mandate in this cause be stayed during the time within which the Plaintiff-Appellee is allowed by law to file such petition for certiorari, and in the event such petition is filed within such time, until it is finally disposed of."

The purpose of this stipulation is to obviate the necessity of a motion for diminution of the record.

Memphis, Tennessee, August 12, 1948.

/S/ Walter P. Armstrong,
Attorney for Respondent, Louise Camp,
Administratrix of the Estate of
Irving (Ervin) Camp, Deceased.

/S/ Edward P. Russell,
Attorney for Petitioner, Frank A.
Thompson, Trustee for the St.
Louis-San Francisco Railway
Company, Debtor.